

NOTE: This motion applies only to offenses committed before April 25, 2005, prior to the advisory sentencing scheme.

**DEFENDANT'S MOTION FOR PRETRIAL DISCLOSURE OF THE STATE'S INTENTION TO
FILE AND PROVE AGGRAVATING SENTENCING FACTORS AND FOR OTHER
PROCEDURAL SAFEGUARDS**

The Defendant, by counsel, respectfully requests that this Court enter Orders: (1) requiring the State, by the omnibus date, to disclose, charge and file, any aggravating sentencing factors, pursuant to Ind. Code § 35-38-1-7.1, that the State intends to prove; (2) requiring that the charged aggravators be described with particularity so that Defendant has sufficient notice in which to prepare his defense and in conformity with the mandates of Ind. Code § 35-34-1-2; (3) requiring the State to produce any and all discovery in support of the charged aggravating factors in compliance with the Local Rules; (4) requiring the sentencing phase be bifurcated from the guilt phase; (5) allowing only aggravating factors be submitted to the jury for a verdict; and (6) requiring the guilt phase jury to also hear the sentencing phase. In support of the Motion, the Defendant states the following:

1. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), requires that the Defendant have sufficient notice of the aggravators the State is charging in an effort to enhance the Defendant's sentence. Article I, Sections 12 and 13 of the Indiana Constitution and the Fourteenth and Sixth Amendments of the United States Constitution require that an offense be charged with specificity so that the Defendant can adequately prepare a defense.

2. In previous cases, the Prosecutor's Office has provided an accused with a copy of the statutory factors and check-marked the applicable factors. This procedure does not comport with the mandates of Blakely. For instance, Indiana Code § 35-34-1-2. (Form of charge), states in pertinent part, that in all criminal cases:

- (a) The indictment or information shall be in writing and allege the commission of an offense by: (1) stating the title of the action and the name of the court in which the indictment or information is filed; (2) stating the name of the offense in the words of the statute or any other words conveying the same meaning; (3) citing the statutory provision alleged to have been violated, except that any failure to include such a citation or any error in such a citation does not constitute grounds for reversal of a conviction where the defendant was not otherwise misled as to the nature of the charges against the defendant; (4) setting forth the nature and elements of the offense charged in plain and concise

language without unnecessary repetition; (5) stating the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense; (6) stating the time of the offense as definitely as can be done if time is of the essence of the offense; (7) stating the place of the offense with sufficient particularity to show that the offense was committed within the jurisdiction of the court where the charge is to be filed; (8) stating the place of the offense as definitely as can be done if the place is of the essence of the offense; and (9) stating the name of every defendant, if known, and if not known, by designating the defendant by any name or description by which he can be identified with reasonable certainty.

The State should be ordered, to the extent possible, to charge and file all applicable aggravating factors in conformity with the mandates of this statute.

3. Since the aggravators constitute a new charge, the State should be ordered to comply with the local rule by producing all discovery in support of the new charge and without a separate motion.

4. The right to a trial by jury is a constitutional protection unique to a person charged with a crime. Blakely holds only that aggravators must be charged, presented to a jury, and proved beyond a reasonable doubt. The State does not have a reciprocal right. Thus, Blakely neither speaks to nor impacts, in any way, the Defendant's right to present mitigators (using proof by a preponderance of the evidence standard) to a trial judge and the trial judge's duty to balance the aggravators against the mitigators in fashioning the defendant's sentence. Therefore, only aggravators should be presented to the jury.

5. Finally, for purposes of continuity and efficient use of resources, the jury hearing the guilt phase should also hear the sentencing phase.

WHEREFORE, the Defendant moves the Court for an Order requiring the State, by the omnibus date, (1) to disclose, charge and file, any aggravating sentencing factors, pursuant to Ind. Code § 35-38-1-7.1, that the State intends to prove; (2) that the charged aggravators be described with particularity so that Defendant has sufficient notice in which to prepare his defense and in conformity with the mandates of Ind. Code § 35-34-1-2; (3) produce any and all discovery in support of the charged aggravating factors in compliance with the local rules; and moves the Court to order the following procedures be followed: (a) the sentencing phase be bifurcated from the guilt phase; (b) only aggravating factors be submitted to the jury for a verdict; and (c) the guilt phase jury will also act as the jury in the sentencing phase, and for all other relief just and proper in the premises.

(Signature)